P.E.R.C. NO. 86-77

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN COMMUNITY COLLEGE
ADULT LEARNING CENTER,

Respondent-Public Employer,

-and- Docket No. CI-85-74-101

VALENTINA REYES,

Charging Party.

NEW JERSEY EDUCATION ASSOCIATION,

Respondent-Labor Organization,

-and- Docket No. CI-85-72-100

VALENTINA REYES,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge that Valentina Reyes filed against the Bergen Community College Adult Learning Center and the New Jersey Education Association. The charge had alleged that the Center and the Association had conspired to discharge her and that the Association violated its duty of fair representation when it refused to submit her discharge to advisory arbitration.

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VALENTINA REYES,

Charging Party.

Appearances:

For the Respondent-Public Employer, Andora, Palmisano, Harris & Romano, Esqs.
(Robert J. Romano, Jr., of Counsel)

For the Respondent-Labor Organization, Sterns, Herbert & Weinroth, Esqs.
(Linda K. Stern, of Counsel)

For the Charging Party, Valentina Reyes, *pro se*

DECISION AND ORDER

On October 25, 1984, Valentina Reyes filed unfair practice charges against the Bergen County Community College Adult Learning Center ("Center") and the New Jersey Education Association ("Association"). The charge alleges that the Center and the

Association violated certain provisions of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").

The Charging Party alleges that the Center violated subsections 5.4(a)(1)(2),(3) and (7)[1/] when it discharged her allegedly pursuant to a conspiracy with the Association. She further alleges that the Association violated subsections 5.4(b)(1) and (5)[2/] when it refused to submit her discharge to advisory arbitration.

On March 6, 1985, Complaints and Notices of Hearing were issued. On March 8, 1985, the cases were consolidated.

On March 18, 1985, the Center filed a statement in lieu of Answer. It asserts it discharged Reyes because of poor job performance.

On April 2, 1985, the Association filed an Answer. It asserts that Association officials fairly represented Reyes and were not obligated to submit her discharge to advisory arbitration.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; and (7) Violating any of the rules and regulations established by the commission."

2/ These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (5) Violating any of the rules and regulations established by the commission."

On April 16 and 17, 1985, Hearing Examiner Arnold H. Zudick conducted hearings. The parties examined witnesses, introduced exhibits and filed post-hearing briefs.

On October 25, 1985, the Hearing Examiner issued his report and recommended decision, H.E. No. 86-19, 11 NJPER __ (¶_____ 1985). We attach a copy. He concluded that Reyes failed to prove that either the Center or the Association, separately or in concert, violated the Act. He found that her discharge was based on her poor job performance, not her protected activity. He also concluded the Association fairly represented the Charging Party.

The Hearing Examiner served his report on the parties and advised them that exceptions, if any, were due by November 8, 1985. Reyes and the Center did not file exceptions or request an extension of time. The Association filed a letter supporting the Hearing Examiner's recommendations but asking that two findings of facts be modified.

We have reviewed the record. The Hearing Examiner's findings of fact (p. 5-16) are accurate with two modifications.[3/] We adopt and incorporate them here. Under all the circumstances of this case, and in the absence of exceptions, we agree with the

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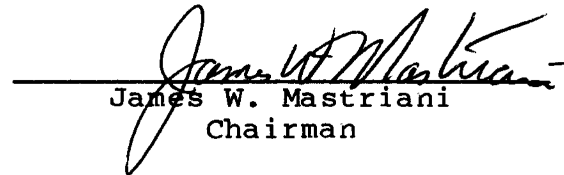
3/ We modify finding of fact no. 9 to state that although Filippi did not recall sending a copy of CP-1 to the Center, the circumstantial evidence indicates he did. We also modify the finding on p. 13 that Tully admitted saying "...honey you have to help yourself." Tully testified that she did not recall using those words, though it was very possible she may have said something to that effect.

Hearing Examiner and find that the Charging Party failed to show by a preponderance of the evidence that either the Center or the Association violated the Act. We, therefore, dismiss the Complaints.

ORDER

The Complaints are dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Suskin and Wenzler voted in favor of this decision. None opposed. Commissioner Hipp abstained. Commissioner Graves was not present.

DATED: Trenton, New Jersey
December 12, 1985
ISSUED: December 13, 1985

H. E. NO. 86-19

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

BERGEN COMMUNITY COLLEGE
ADULT LEARNING CENTER,

Respondent-Public Employer,

-and-

Docket No. CI-85-74-101

VALENTINA REYES,

Charging Party.

NEW JERSEY EDUCATION ASSOCIATION,

Respondent-Labor Organization,

-and-

Docket No. CI-85-72-100

VALENTINA REYES,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that neither the Bergen Community College Adult Learning Center nor the New Jersey Education Association violated the New Jersey Employer-Employee Relations Act when the Center refused to renew the appointment of Valentina Reyes, and when the Association was unable to regain her appointment.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H. E. NO. 86-19

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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(Robert J. Romano, Jr., of Counsel)

For the Respondent-Labor Organization
Sterns, Herbert & Weinroth, Esqs.
(Linda K. Stern, of Counsel)

For the Charging Party
Valentina Reyes, *pro se*

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

On October 25, 1984, Valentina Reyes ("Charging Party") filed unfair practice charges with the Public Employment Relations

Commission ("Commission") against the Bergen Community College Adult Learning Center ("Center")(Docket No. CI-85-74-101), and against the New Jersey Education Association ("Association")(Docket No. CI-85-72-100) alleging that the Center and the Association violated certain provisions of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Charging Party had been employed by the Center as a teacher for approximately five years primarily teaching adults "English as a Second Language" ("ESL"), but the Center refused to renew her appointment (i.e. discharged her) in July 1984.[1/]

Reyes alleged that the Center violated §§5.4(a)(1), (2), (3) and (7) of the Act because it discharged her due to her exercise of protected activity.[2/] She also specifically alleged that officials of the Center and Association engaged in a conspiracy which resulted in her discharge.[3/]

1/ The teaching position held by the Charging Party did not require state certification, nor was it protected by the tenure laws as set forth in N.J.S.A. Title 18A.

2/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (7) Violating any of the rules and regulations established by the commission."

3/ The Charging Party actually alleged that there was a "confabulation" between officials of the Center and
(Footnote continued on next page)

Reyes alleged that the Association violated §§5.4(b)(1) and (5) of the Act by failing to fairly represent her; by failing to file and/or to properly pursue a grievance against the Center; and by the acts of local Association President Marianne Tully in conspiring with Center officials to remove her from her position.[4/]

Complaints and Notices of Hearing were issued on March 6, 1985, and an Order Consolidating the two cases issued on March 8, 1985. On March 18, 1985 the Center filed a statement in lieu of Answer (Exhibit C-2) indicating that it relied upon its pre-complaint statement of position dated January 9, 1985 as its Answer. The Center denied committing any violation. It asserted that Reyes did not receive a satisfactory recommendation for re-employment because she had received unsatisfactory evaluations and failed to complete a remedial plan of action within the time

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(Footnote continued from previous page)
Association that resulted in her discharge. The word "confabulation" is actually defined as "conversation or discussion." The Random House College Dictionary, 1973. It is apparent that the Charging Party was alleging that the Center and Association "conspired" against her (i.e. plotted to remove her from her position) and, therefore, all references by the Charging Party to a "confabulation" should be assumed to be references to a "conspiracy."

4/ These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act and (5) Violating any of the rules and regulations established by the commission."

provided.[5/] On April 2, 1985 the Association filed its answer denying the allegations in the Charge. The Association asserted that both local and state Association officials fairly represented Reyes in her difficulties with the Center.

On April 8 and 11, 1985, the Association and the Center, respectively, filed Motions to Strike certain allegations in the respective Charges as being barred by the six-month statute of limitations contained in §5.4(c) of the Act. Since both Charges were filed on October 25, 1984, the six-month statute of limitations would extend back to April 25, 1984. Both Respondents argued that allegations concerning events that occurred outside the statute of limitations should be stricken.

In particular, Reyes alleged that in September 1983 she was scheduled to be laid off in violation of the collective agreement. Although that layoff schedule - at least as to Reyes - was quickly rescinded, Reyes sought to introduce that evidence at hearing. Reyes also sought to introduce facts related to February 1984, which was also outside the statute of limitations period.

5/ In her Charge against the Center Reyes alleged that because the Center had hired a new teacher in February 1984, that one existing teacher would lose his/her position. In its Answer the Center denied that the hiring of one teacher was contingent upon the discharge of another. It argued that an individual grant existed for each position. Reyes did not produce any evidence to support this particular allegation.

Hearings were held in this matter on April 16 and 17, 1985 in Newark, New Jersey.[6/] After opening the record I disposed of the Respondents' Motions to Strike. The Charging Party, in response to the Motions, stated that much of the 1983 and early 1984 information would only be introduced as background information. (Transcript "T" p. 10) I sustained the Motions with respect to allegations of incidents that occurred prior to April 25, 1984, but I indicated that I would allow evidence of relevant events that occurred prior to April 25 to come on the record as background information. (T pp. 11-13)

All of the parties filed post-hearing briefs by July 24, 1985, and the Association filed a reply brief on July 26, 1985.

Based upon the entire record I make the following:

Findings of Fact

1. The Center is a public employer within the meaning of the Act and had employed the Charging Party for several years.

2. The Association is an employee representative within the meaning of the Act and was the Charging Party's majority representative.

3. The Charging Party was a public employee within the meaning of the Act and was employed by the Center as a teacher for several years.

6/ Both prior to the hearing and throughout the conduct of the hearing I thoroughly advised the Charging Party of her rights, responsibilities and burdens. I gave the Charging Party, and the Respondents, every opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally.

4. A chronology of events shows that on February 21, 1984 Reyes' supervisor, Jessica White, advised her that she would be observed on February 27, 1984 (Exhibit J-2). On that date White prepared a lengthy written observation of Reyes (Exhibit J-3) which listed several areas of unsatisfactory performance. Reyes was criticized for insufficient organization, unclear presentation, insufficient technique, and lack of objectives and goals. Reyes signed J-3 on February 29, 1984, but she did not concur with White's remarks, and on March 16, 1984 she submitted a response to the observation (Exhibit J-4). On March 21, 1984, White, in Exhibit J-5, asked Reyes to clarify certain information from J-4, but on March 22, 1984 Reyes responded (Exhibit J-6) that she would make no further comments.

On May 29, 1984 Reyes was evaluated by White, and the Center's Director, Walter Hecht. The evaluation (Exhibit J-7) resulted in an unsatisfactory rating. Hecht and White noted that Reyes had refused to accept and respond to corrective criticism, and had not followed recommendations for improving her teaching skills (T p. 241). They concluded that Reyes would be placed on probation from June 1-July 15, 1984, and that they would not recommend her for continued employment unless she made satisfactory progress. Hecht and White also requested Reyes to prepare a statement of willingness to work on a plan for remediation. Reyes signed and concurred with the evaluation, and produced a letter on June 1, 1984 (Exhibit J-8) expressing a willingness to work cooperatively on a plan of

remediation.[7/]

On June 11, 1984 Associate Dean Charles Morgan reminded Reyes that she was on probation (Exhibit J-9), and on the same date recommended to Dean Lois Marshall (through Exhibit J-10) that unless Hecht and White stated by July 15, 1984 that Reyes had progressed to warrant continued employment, that she not be employed by the Center more than 30 days from that date. Having received J-7 and J-10, Dean Marshall, also on June 11, signed J-7 and wrote that Hecht advise her no later than July 17, 1984 whether Reyes' progress warranted continuation in the program, or warranted termination.

On June 26, 1984 Hecht and White observed Reyes and issued another unsatisfactory report (Exhibit J-12).[8/] They observed no improvement in the areas that were the subject of the previous observation. On that same date Reyes, although under protest, prepared, with the assistance of Association Vice President Alan Filippi, a memorandum to Hecht (Exhibit CP-1) listing her plan

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7/ Reyes maintained that the May 29 evaluation was improper because she only received one observation prior thereto, whereas other employees received at least two observations (T p. 47). However, Reyes did not submit any corroborative evidence that the Center deviated from the norm in the conduct of her evaluation process. In fact, it appears that the Center complied with the evaluation requirements in Article 11 of the collective agreement between the Center and the Association (Exhibit J-1). I found nothing in J-1 to require more than one observation.

8/ Reyes saw J-12 on June 29, 1984 and a copy was forwarded to her by letter of July 3, 1984 (Exhibit J-15).

objectives.[9/]

On June 28, 1984 Hecht and White again observed Reyes, and again issued an unsatisfactory report (Exhibit J-13).[10/] On that same day Hecht and White, in Exhibit J-11, responded to Reyes' memorandum, CP-1. Hecht and White emphasized that Reyes had not been asked to prepare a plan of remediation, but was only asked for her perception of those areas that needed remediation. (T pp. 263, 287) Hecht and White concluded J-11 by attaching a plan for remediation which had to be completed by July 15, 1984. However, certain parts of the plan were due on July 9, 10, 11 and 12, 1984. The record shows that in addition to Reyes, three other employees were placed on probation and were required to satisfactorily complete the same remedial assignments (T pp. 239-240, 283).

Although Reyes admitted that the remedial assignments were not difficult (T p. 182), by July 8, 1984 she had not completed any remedial assignments because she was too busy to do such work during her normal workday due to a heavy teaching load (T p. 86), and because she chose not to complete any assignments on her own time due to her need to spend time with her seriously ill husband. (T pp. 172-173). Thus, on July 9, 1984 Reyes placed a letter in

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9/ Reyes prepared a longhand draft of her plan objectives (Exhibit J-28) and Filippi typed that plan as CP-1. Filippi also attached a note (Exhibit CP-2) to CP-1 stating that he had sent out copies of CP-1. However, Filippi admitted he did not send a copy of CP-1 to the Center, and forgot to send one to NJEA consultant Howard Parish. (T pp. 296-297)

10/ Reyes saw J-13 on June 28, 1984, and a copy was forwarded to her by letter of July 2, 1984 (Exhibit J-14).

Hecht's mailbox (Exhibit J-16) asking for additional time to complete the assignments. Reyes also indicated that she had kept a log of her work the previous week. However, prior to July 9, Reyes had not notified Hecht that she was having difficulty finding the time to complete the assignments. Later on July 9, Hecht, having received J-16, prepared a response thereto (Exhibit J-17), and informed Reyes that if she wanted an extension beyond July 10, that she was required to provide him with her work log by 4:30 p.m. that day (July 9). Even later on July 9, Hecht saw Reyes and requested her work log, and also requested that she speak with him in his office. (T p. 282). Reyes refused to meet with Hecht at that time, however, because she wanted to leave for home, and because she did not have her work log with her at that time (T p. 282).

On July 10, 1984 Hecht informed Reyes (Exhibit J-18) that he would not grant more than a one-day extension (to the end of July 10) because she failed to submit her log to him and refused to meet with him on July 9, 1985. Later on July 10, 1984, Reyes wrote Hecht (Exhibit J-19) acknowledging receipt of J-17 and including copies of her work log.

On July 17, 1984 Hecht and White sent a memorandum (Exhibit J-20) to Dean Marshall recommending that Reyes not be reappointed because she failed to complete any remedial assignments. On July 25, 1984 Reyes received a letter from Associate Dean Morgan (Exhibit J-21) informing her that she would not be reappointed for 1984-85, and that her termination date was August 22, 1984. The record shows

that the three other employees who were placed on probation satisfactorily completed the remedial assignments within the same time provided to Reyes, and they were all reappointed (T pp. 240, 284).

5. The record shows that prior to the instant matter Reyes had never filed a grievance or a charge, and was not an officer of the Association (T p. 134). Reyes admitted that prior to the instant matter she had never had a problem with Hecht or the administration, and that Hecht had previously recommended her retention. (T pp. 141-142, 145). She further admitted that the program she was teaching had been developed by a group of teachers, not the administration, and that White never mentioned anything regarding the Association when she gave her an unsatisfactory observation in February 1984 (T pp. 144, 153).

The record also shows that Reyes informed Tully of the February observation, and Tully at one point offered her help, but Reyes responded that she did not want to work there any longer and wanted to leave quietly. (T pp. 50-52, 322-324).11/ Reyes first

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11/ Reyes' and Tully's testimony conflicts on several points. Reyes testified that she informed Tully about everything that was happening to her and that she wanted help, but that Tully would not listen to her. She also testified that she asked for a grievance. (T p. 51). Tully testified that Reyes did not come to her after the February observation and did not ask for her help, and that she asked Reyes if she wanted help. (T p. 323). I cannot fully credit either witness. Reyes was

(Footnote continued on next page)

alleged that there was a conspiracy against her because of Tully's alleged behavior. (T p. 52). But when asked why Tully and White would conspire against her, Reyes responded that she did not know why they wanted to remove her from her position. (T pp. 65, 81).

White testified that during the evaluation conference on May 29, 1985 she and Hecht advised Reyes that they were trying to help her and wanted her to improve her skills (T pp. 242-243). However, White testified that Reyes felt as if there was no use in going on and that she didn't care. (T pp. 242-243) White further testified that Reyes had resisted taking direction and was not responsive to constructive criticism. (T pp. 240-241).

After Reyes was observed on June 26, Exhibit J-12, she sought and received Filippi's assistance. Reyes admitted that Filippi typed CP-1 for her and wrote the cover letter, CP-2 (T pp. 69-70), and that he offered to file a grievance on her behalf. (T pp. 133, 189). However, Reyes also testified that Filippi withdrew his offer to grieve on her behalf, and that he failed to send CP-1 to Parish, allegedly because of a conspiracy against her. (T pp. 74, 133, 189).

(Footnote continued from previous page)
very emotional throughout her testimony and often confused her facts. Tully testified that Reyes never discussed the situation with her, yet Tully and Reyes shared an office and I cannot believe that they never discussed the circumstances involving Reyes. I do believe that Reyes informed Tully of the incidents, but I also believe that Reyes said she did not want to work there any longer.

Filippi admitted that he forgot to send CP-1 to Parish, but he denied withdrawing his offer to file a grievance on her behalf (T p. 299). I credit Filippi's recollection of these facts. He did not withdraw his offer to grieve.[12/] In fact, I credit Filippi's testimony that Reyes rejected his offer to grieve and told him that she wanted to leave the Center with a clear record (T p. 298).

Reyes alleged that at the June 28 observation meeting with Hecht and White, they reprimanded her for seeking Filippi's assistance in preparing the plan set forth in CP-1 (T pp. 84-85, 120-121). White specifically denied telling Reyes not to talk with union officials (T p. 253), and Hecht denied ever having discussions with Reyes about her union activities (T pp. 276-277).

The record also shows that on July 9, 1984 Tully overheard Hecht talking to Reyes about her remedial assignments (T pp. 94, 328). Tully overheard Reyes telling Hecht that she did not have time to meet with him (T p. 328), and she heard Hecht tell Reyes that she was not making an effort to stay employed at the Center (T p. 327).

12/ Reyes alleged that Filippi withdrew his offer to grieve because he was seeking to enter or attend graduate school and did not want any conflicts with the Center's administration which might adversely affect his ability to be accepted in a graduate program. The facts show, however, that Filippi was accepted in a graduate program on March 9, 1984 (Exhibit RA-3), he was offered a fellowship on March 30, 1984 (Exhibit RA-4), and his acceptance of the offer was confirmed on April 24, 1984 (Exhibit RA-5). Since Filippi was already accepted in the program prior to his meeting with Reyes on June 26, it is unlikely that he would be afraid to process Reyes' grievance.

Reyes testified that Hecht said that Tully was his witness that Reyes refused to meet with him, and that Tully would testify against her (T p. 96). Reyes asked Tully if she would testify against her and Tully allegedly said: "I heard the conversation, it is true." (T p. 97) When Reyes asked Tully for help Tully allegedly said: "Honey, you have to help yourself." (T p. 97) Tully admitted that she said, "Honey, you have to help yourself," and she explained that she made that comment because Reyes had not done any remedial assignments. (T p. 331). However, Tully testified that she neither offered to - nor was asked to - testify against Reyes (T p. 330).

6. The chronology of events after Reyes' termination date show that on August 23, 1984 Reyes met first with Dean Marshall, and then with Peter Helff, an NJEA consultant who was also an executive board member and grievance chairman of the Bergen Community College Faculty Association which is affiliated with the NJEA (T p. 335). Reyes told Helff of her termination and also complained that the local Association did not provide her with adequate representation (T p. 335). Helff was concerned about Reyes' complaint, and as a result, he checked the grievance procedure in J-1 and contacted the NJEA for authority to file a grievance on her behalf (T pp. 338-340). Helff was authorized to file the grievance and was instructed to then forward all of Reyes' documents to NJEA consultant, Howard Parish, who was authorized to provide Reyes with any further assistance (T pp. 341-342).

On August 24, 1984 Reyes wrote to Marshall (Exhibit J-22) expressing her belief that she was unfairly treated. On August 28, 1984 Helff filed the grievance (Exhibit J-23) over Reyes's dismissal. Shortly thereafter, Parish attempted to contact Reyes by telephone but was unsuccessful. Consequently, on September 7, 1984 Parish's office sent Reyes a letter (Exhibit J-25) requesting her to call Parish.

Reyes finally contacted Parish on September 11, 1984 and informed him that she was being discriminated against (T p. 353), and that she wanted to pursue her grievance (T p. 361). Parish expressed his willingness to continue the grievance, but he advised Reyes that the grievance might be untimely (T p. 361). Parish asked Reyes what remedy she was seeking and he testified that she responded that:

> ...she did not feel that she could work in the center any longer given the conditions against her. That the only remedy that she would seek would be to clear her name and find a means by which she would have a recommendation that would allow her to get future employment (T p. 354).

When he asked if she wanted her job back she allegedly responded that:

> ...it would be impossible to work under these circumstances (T p. 363).

Reyes insisted that she told Parish that she wanted her job back (T p. 106), but she also admitted that she could not go back and face the same "injustice," and could not work there because of the manner in which she was treated. (T p. 199) She also admitted that she wanted her record cleared of negative comments. (T p. 200).

Once Parish heard that Reyes was primarily interested in clearing her record and receiving good recommendations he suggested to Reyes that he might be able to obtain those items as a settlement of the case without the need to pursue the grievance (T pp. 354-355). With what he believed was Reyes' authorization, Parish contacted several Center and College officials and obtained from them the offer to provide Reyes with positive letters of recommendation in exchange for her dropping the grievance (T pp. 355-356).

On September 13, 1984 Parish telephoned Reyes and informed her of the settlement offer he had obtained, but Reyes rejected the offer and insisted on her job back. (T p. 357). At that point Parish informed Reyes that it would be inappropriate for him to go back to the College for a change in the offer (T p. 357), and he recommended to Reyes that she accept the offer.

After discussing the settlement offer, Reyes, also on September 13, 1984, sent Parish a letter (Exhibit CP-3) asking him to proceed with the grievance. On September 14, 1984 Parish sent Reyes a letter (Exhibit J-26) reviewing the circumstances of the telephone conversation and the settlement offer, and he informed Reyes that there was no further action possible by the Association. Reyes responded by letter dated September 19, 1984 (Exhibit J-27) again discussing the circumstances surrounding Parish's involvement herein. Reyes admitted that Parish misunderstood her requests (J-27, T p. 116), and she subsequently telephoned Parish and thanked him for his efforts (T p. 118).

7. Reyes did not present any evidence that the Center dominated or interfered with the operation of the Association, nor did she prove that the Center or Association violated the Commission's rules or regulations.

ANALYSIS

Although my sympathies rest with the Charging Party, she failed to show by a preponderance of the evidence that either the Center or the Association, or the Center and Association in conspiracy with one another, violated the Act. Both White and Tully may have shown some personal hostility towards the Charging Party, but any such hostility was not generated by the Charging Party's exercise of her protected activity, nor did it deprive her of her protected rights.

The Charge Against the Center - CI-85-74-101

The Charging Party alleged in part that she was discharged in July 1984 because the Center had failed to successfully discharge her in September 1983. I do not agree. Reyes' name on a reduction in force list in September 1983 was nothing more than an administrative mistake which was quickly remedied. Her discharge in July 1984, however, was based upon her performance, not her protected activity.

The Commission established a test in In re Boro of Haddonfield Bd.Ed., P.E.R.C. No. 77-36, 3 NJPER 71 (1977), holding that in order to establish a violation of §5.4(a)(3) of the Act, it must be determined that an employer's acts were motivated in whole or in part by a desire to encourage or discourage employees in the

exercise of the rights guaranteed to them by the Act, or that its acts had such an effect on the employees. The Commission held that a Charging Party must prove that an affected employee was exercising rights guaranteed by the Act, and prove that the employer had knowledge of such activity. The record in this case shows that Reyes was not - and had not been - exercising protected activity in February and May 1984, the time of her first unsatisfactory observation and of the evaluation, respectively, which were the first two events which precipitated her discharge. The first recommendation to discharge Reyes was actually made by Dean Morgan to Dean Marshall on June 11, 1984. Hecht and White had only recommended probation for Reyes, and specifically indicated that they would recommend reappointment if she satisfactorily completed her rememdial assignments. It was Dean Marshall, not Hecht, who decided that a recommendation on Reyes had to be made by July 17, 1984.

The only protected activity that Reyes participated in was on June 26, 1984 when she obtained Filippi's assistance in preparing a plan of remediation, and in discussing the filing of a grievance. Prior to that time there was no evidence that Reyes exercised any protected activity within the six-month statute of limitations period. But even if she did, there was no evidence that White, Hecht, Morgan or Marshall had knowledge of her exercising any protected activity prior to May 29 or June 11, 1984, the dates she was originally considered for discharge due to poor performance.

The Charging Party also argued that she was discharged, in part, because she obtained Filippi's assistance on June 26, 1984. She argued that White and Hecht criticized and harassed her for discussing her problem with Filippi. White and Hecht denied making any such comments. However, assuming arguendo that they did make such remarks and thereby commit a violation of §5.4(a)(1) of the Act, those alleged remarks had no connection to - and did not have an effect on - or cause - Reyes' discharge. The initial circumstances leading to Reyes' discharge had already taken place on February 27, May 29, June 11, and in fact, June 26, 1984 prior to the time Reyes met with Filippi which was after the June 26 observation.

Subsequent to the June 28 meeting with Hecht and White, Reyes' future employment was still vested in her own abilities and her own performance despite any alleged comments by Hecht or White. The record shows that if Reyes had satisfactorily completed the remedial assignments within the time provided she would have been recommended for reemployment. Her failure to complete those assignments was not attributable to any illegal acts by the Center. Pursuant to Dean Morgan's statement in J-10, Hecht could only recommend Reyes' reappointment if she "sufficiently progressed" to warrant continuation as an employee. Then, pursuant to Dean Marshall's remarks in J-7, Hecht had to submit some recommendation by July 17, 1984. Consequently, Hecht had limited flexibility to grant Reyes additional time to prepare the remedial assignments. Reyes had not requested additional time from Hecht until July 9,

despite knowing that she had not even started the remedial assignment. I find that it was Reyes' own failure to perform her remedial assignments within the time provided, and not comments by Hecht or White, that resulted in her discharge. Even the unsatisfactory observations that Reyes complained of were not the catalyst for her discharge. She was only discharged because she had not completed the remedial assignments.[13/]

In addition to the Haddonfield test, the more recent "dual motive" or "business justification" test established by the New Jersey Supreme Court is also applicable in this case. In Bridgewater Twp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) the Court held that a Charging Party in an (a)(3) discharge case must first prove the existence of the elements of an unlawful motive which then shifts the burden to the employer to prove that legitimate business justification existed for its actions. In this case Reyes did not even prove that she was discharged, in part, because of the exercise of protected activity. But even if she had, the overwhelming evidence shows that she was discharged due to unsatisfactory performance, and particularly because she failed to complete any remedial assignments. The Center satisfied the business justification test.

13/ It appears that the primary reason Reyes did not complete her remedial assigments was because of her need to spend all her personel time with her ill husband. Although I sympathize with the Charging Party, the Center was entitled to receive the completed assignments, and it was not legally obligated to give Reyes additional time to complete the same.

Accordingly, I recommend that the Charge against the Center be dismissed.

The Charge Against the Association - CI-85-72-100

In adjudicating unfair representation claims the courts of this State, and the Commission, have consistently embraced the standards established by the United States Supreme Court in Vaca v. Sipes, 386 U.S. 171 (1967)("Vaca"). See e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); In re Board of Chosen Freeholders of Middlesex County, P.E..C. No. 81-62, 6 NJPER 555 (¶11281 1980), aff'd. Ap. Div. Docket No. A-1455-80 (April 1, 1982), pet. for certif. den. (6/16/82)("Middlesex County"); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979)("Local 194"); In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978). The Court in Vaca held that

> ...a breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the collective barainin unit is arbitrary, discriminatory or in bad faith. 386 U.S. at 190.

In fact, the U.S. Supreme Court also held that to establish a claim of a breach of the duty of fair representation:

> ...carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. Amalgamated Assoc. of Street, Electric Railway and Motor Coach Employes of America v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971).

However, the National Labor Relations Board has held that where a majority representative exercises its discretion in good faith,

proof of mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. Service Employees Int'l Union, Local No. 579 AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977); Printing and Graphic Communication, Local 4, 249 NLRB No. 23, 104 LRRM 1050 (1980), reversed on other grounds 110 LRRM 2928 (1982).

The Charging Party alleged that the Association failed to fairly represent her based upon the actions of Tully, Filippi, and Parish. I do not agree. The Association as a whole did not act in an arbitrary, discriminatory or bad faith manner in representing Reyes. In order to determine whether the Association violated the Act the actions of Tully, Filippi, Helff and Parish must be considered as a whole since they were all serving as representatives of the Association in their interaction with the Charging Party. In re OPEIU Local 153 (Thomas Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983).

The record shows that Filippi, Helff and Parish clearly assisted the Charging Party in her dealings with the Center, and Helff actually filed a grievance on her behalf, and Parish offered to process the grievance. Their combined efforts on Reyes' behalf evidenced the Association's intent to fairly represent her. Although there may have been a breakdown in communications between Reyes and Parish regarding the remedy she was seeking, Parish had every right to assume, based upon Reyes' own admission, that she could not work at the Center and was primarily interested in letters

of recommendation as a remedy. Any suggestion by the Charging Party that Parish acted improperly or illegally or in conspiracy with the Center in obtaining a settlement for Reyes that did not include a job offer, was an unjustified and unsubstantiated characterization of a good faith effort to resolve the grievance. Both Filippi and Parish acted in Reyes' best interest, and their actions certainly did not rise to the level of being arbitrary, discriminatory or in bad faith.

Since Reyes was fairly represented through the combined efforts of Filippi, Helff and Parish, any lack of representation or personal hostility that may have been exhibited by Tully would not, standing alone, rise to the level of a violation of the Act.

Accordingly, I recommend that the Charge against the Association be dismissed.

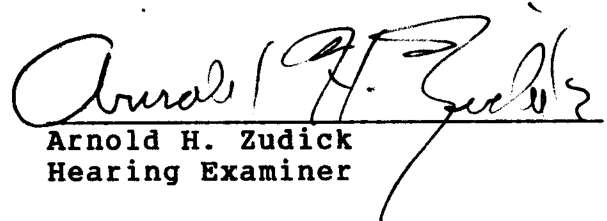
<u>The Conspiracy Allegation</u>

Reyes admitted that she did not know why the Center and Association would conspire against her. She was thus unable to prove by a preponderance of the evience that a conspiracy existed. There is simply no evidence that Tully and White, or Tully and Hecht, or any other representatives of the Center and Association, ever planned or agreed together to take any action against Reyes. That allegation must therefore be dismissed.

Based upon the above findings and analysis I make the following:

Recommended Order

I recommend that the Commission ORDER that the Complaint be dismissed in its entirety.



Arnold H. Zudick
Hearing Examiner

Dated: October 25, 1985
Trenton, New Jersey